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Supreme Court, U.S.
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No. 95-1246

In the Supreme Court of the United States

OCTOBER TERM, 1995

GLORIA V. SMITH, PETITIONER

v.

MARVIN J. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is barred, under the doctrine of collateral estoppel, from relitigating the issue of whether she had exhausted her administrative remedies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is unpublished, but the judgment is noted at 65 F.3d 182 (Table). The opinion of the district court (Pet. App. 5a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1995. A petition for rehearing was denied on November 3, 1995. The petition for a writ of certiorari was filed on February 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was employed by the United States Postal Service from February 6, 1972, until July 30, 1988, when her dismissal became effective. Pet. 4. The instant case is the fourth in a series of lawsuits that petitioner filed in the United States District Court for the Southern District of Florida, alleging racial discrimination, reprisal, and sexual harassment by the Postal Service. Pet. App. 5a-6a. Petitioner's first action was dismissed for lack of prosecution. *Id.* at 6a. Petitioner's second action, in which she alleged, *inter alia*, that her firing was the result of racial and gender discrimination in violation of Title VII of the Civil Rights Act of 1964, was dismissed for failure to exhaust administrative remedies and failure to name the proper party as defendant. Pet. App. 6a. Petitioner filed a third action, which was dismissed for failure to serve the opposing party as required by Rule 4(j) of the Federal Rules of Civil Procedure. *Ibid.*

Petitioner filed the instant action, which involves essentially the same allegations as her second suit, in July, 1992. Pet. App. 7a. The district court dismissed this action for failure to exhaust administrative remedies. The district court held that petitioner was collaterally estopped from relitigating the court's ruling on exhaustion in petitioner's second suit and that petitioner had not exhausted her administrative remedies since that earlier ruling. *Ibid.* The court of appeals affirmed. *Id.* at 3a-4a.

1. a. On October 6, 1986, while still employed by the Postal Service, petitioner brought an action against her employer in the United States District Court for the Southern District of Florida. Peti-

tioner alleged, *inter alia*, that the Postal Service had breached the collective bargaining agreement, defrauded her of compensation, and improperly removed her from her position as a window clerk.[1] *Smith* v. *United States Post Office*, No. 86-8568 (S.D. Fla.) (*Smith I*); Defendant's Summary Judgment Memorandum Exh. A.[2] That action was eventually dismissed for lack of prosecution in March, 1988. Pet. App. 6a.

b. On July 8, 1987, while *Smith I* was pending, petitioner filed another complaint against the Postal Service, alleging racial discrimination and reprisal. *Smith* v. *United States Postal Service*, No. 87-8495

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[1] Petitioner had previously filed a grievance with her union concerning her removal from the window clerk position. On October 31, 1986, after an arbitration hearing, the Arbitrator denied petitioner's grievance. The Arbitrator found that

> [t]he Grievant's performance, as outlined, is almost unbelievably bad. The Union suggests that she might have been helped by more remedial training, but I find this highly unlikely. The Grievant's problem was not her lack of knowledge and skills, but rather was her careless and irresponsible attitude toward her job and toward the customers of the Postal Service. Her contention that Mr. Bullard was picking on her is 180 degrees off the mark; if anything, he went to considerable trouble to rescue her from the consequences of her own carelessness, and even when it became impossible to tolerate her unsatisfactory performance any longer he allowed her to remain a postal employee instead of resorting to disciplinary removal action.

Defendant's Summary Judgment Memorandum at 2, *Smith* v. *United States Postal Service*, No. 87-8495 (S.D. Fla.) (*Smith II*). See also Pet. 5-6.

[2] Unless otherwise identified, the court papers cited in this brief were filed in the instant action.

(S.D. Fla.) (*Smith II*); Defendant's Summary Judgment Memorandum Exh. B. The focus of that complaint was petitioner's five-day suspension without pay in September, 1986.

c. On April 5, 1988, the Postal Service notified petitioner that she was to be removed from her position, effective May 6, 1988, because of her repeated failure to maintain a satisfactory attendance record. Pet. 6; Response to Defendant's Motion for Reconsideration Exhs. 1, 2. Petitioner filed a grievance with her union challenging that notice. The dispute was resolved by a settlement that allowed petitioner to return to work on May 31, 1988, after serving a 22-day suspension. *Ibid.*

Petitioner, however, did not return to work by May 31 as agreed. Accordingly, on June 8, 1988, the Postal Service advised petitioner that she would be removed from her position if she did not report to work immediately. Petitioner did not report to work. On June 20, 1988, the Postal Service issued a new notice of removal advising petitioner that she would be dismissed effective July 30, 1988. On July 28, 1988, petitioner informed the Postal Service of her decision not to return to duty. Pet. 6; Response to Defendant's Motion for Reconsideration Exh. 1. Petitioner has never filed an administrative complaint specifically challenging the June 20, 1988, notice of removal. Defendant's Summary Judgment Memorandum, *Smith II*, at 4.

d. At about the time of her termination, petitioner filed two formal Equal Employment Opportunity (EEO) complaints with the Postal Service, neither of which referenced the June 20, 1988, notice of termination. On July 28, 1988, petitioner filed a formal EEO complaint (Case No. 3-S-0297-88), alleging racial dis-

crimination and reprisal in her disqualification from consideration for an accounting clerk position in January, 1988.[3] On August 3, 1988, petitioner filed another EEO complaint (Case No. 3-S-0300-88) challenging the April 5, 1988, notice of termination (the subject of her union grievance, which had already been settled).[4] Each of those complaints concerned employment actions that occurred prior to the June 20, 1988, notice of termination.

e. On November 7, 1988, petitioner amended her complaint in *Smith II*. As amended, the complaint alleged race discrimination, reprisal, and sexual harassment, and challenged, *inter alia*, her July 30, 1988, termination from employment. Petitioner claimed that the Postal Service's actions constituted willful violations of Title VII, as well as of 42 U.S.C.

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[3] On September 25, 1989, the Postal Service issued a final agency decision in Case No. 3-S-0297-88. The Postal Service agreed with an administrative law judge's recommendation against a finding of discrimination.

[4] On March 6, 1989, the Postal Service dismissed Case No. 3-S-0300-88 because it believed that petitioner was simultaneously contesting the same matter in federal district court in *Smith II*. Response to Defendant's Motion for Reconsideration Exh. 3. The Postal Service advised petitioner that, if the district court denied jurisdiction of her lawsuit, she could seek reopening of her EEO administrative claim challenging the April 5, 1988, notice of termination. *Ibid.*

After *Smith II* and *Smith III* were dismissed, petitioner requested reopening of that administrative claim. The Postal Service denied her request on March 26, 1992. Response to Defendant's Motion for Reconsideration Exh. 6. Petitioner timely appealed that denial to the Equal Employment Opportunity Commission. On July 27, 1992, the Commission affirmed the Postal Service's decision not to reopen the claim. Pet. 8.

1981 and 1983. Defendant's Summary Judgment Memorandum Exh. B.

The Postal Service moved to dismiss or, in the alternative, for summary judgment, on the ground that petitioner had failed to exhaust her administrative remedies by not administratively challenging the July 30, 1988, termination. The Postal Service also argued that petitioner's complaint should be dismissed for failure to name the proper defendant. On June 16, 1989, the district court granted the defendant's motion to dismiss *Smith II* on both grounds. Pet. App. 6a. Petitioner did not appeal that decision. Pet. 7.

f. Petitioner filed a third lawsuit against the Postal Service on October 30, 1989. *Smith* v. *Frank*, No. 89-8534 (S.D. Fla.) (*Smith III*); Defendant's Summary Judgment Memorandum Exh. C. The district court dismissed that suit on January 31, 1991, for failure to effect service on respondent within the time period set forth in Rule 4(j) of the Federal Rules of Civil Procedure. Pet. App. 6a; Pet. 8.

2. Petitioner brought the instant action against respondent on July 29, 1992, alleging racial discrimination, reprisal, and sexual harassment in violation of Title VII, the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. 1983. *Smith* v. *Runyon*, No. 92-8456 (S.D. Fla.) (*Smith IV*). The focus of her complaint was the allegation that "Defendant's discriminatory practices * * * resulted in Plaintiff being fired from her employment * * * based on her race (Black) and reprisal, in violation of Plaintiff's rights under Title VII." Complaint at 4 (¶ 18). Petitioner also alleged that her removal violated her constitutional rights and the terms of the collective bargaining agreement. *Id.* at 3 (¶ 17),

4 (¶ 18). Petitioner sought relief including "twice the amount of back pay from her date of being fired" and back pay for an unspecified "suspension of thirty-four (34) days." *Id.* at 4 (¶ 21).

3. The district court dismissed the case for failure to exhaust administrative remedies. Pet. App. 5a-8a.[5] The district court noted that it had previously dismissed petitioner's action in *Smith II* on the ground that petitioner had failed to exhaust her administrative remedies. It also noted that "[c]ollateral estoppel forecloses litigation of those issues of fact or law that were actually litigated and necessarily decided between the parties." *Id.* at 7a. Since petitioner's claims in the present case are "essentially identical" to those asserted in *Smith II*, the district court found that "the Court's prior determination regarding exhaustion of administrative remedies is controlling here." *Ibid.* The district court went on to conclude that,"[w]hereas the plaintiff has[] presented no evidence that her administrative remedies have been exhausted since June 16, 1989 [the date that *Smith II* was decided], the Court must dismiss this case for failure to exhaust administrative remedies." *Ibid.*

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 3a-4a. The court of appeals held that the district court correctly determined that petitioner had not exhausted her administrative remedies in a timely fashion, as required by the applicable statutes, regulations, and case law. *Id.* at 4a.

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[5] The district court granted respondent's motion to dismiss after reconsideration of the court's initial denial of that motion. Pet. App. 9a-10a.

ARGUMENT

It is well settled that a federal employee must exhaust her administrative remedies before bringing a Title VII claim against her employer in federal district court. See *Brown* v. *General Services Admin.*, 425 U.S. 820, 832-833 (1976).[6] In this case, the district court held (1) that it was bound by its earlier determination in *Smith II* that petitioner had not exhausted her administrative remedies as of June 16, 1989; and (2) that petitioner "presented no evidence that her administrative remedies ha[d] been exhausted since June 16, 1989." Pet. App. 7a.

Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit * * * involving a party to the prior litigation." *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984). Thus, collateral estoppel will bar a party from relitigating a particular issue of fact or law if three requirements are met: (1) the issue is identical to one that was raised in a previous suit involving that party; (2) the issue was actually litigated and decided in the previous suit; and (3) the issue was necessary to the judgment in the previous suit. See *Richardson* v. *Alabama State Bd. of Educ.*, 935 F.2d 1240, 1245 (11th Cir. 1991).

All three requirements are met in this case. Petitioner's complaints in this case and *Smith II*

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[6] Under the regulations in effect at the time, petitioner was required to initiate contact with the Postal Service's EEO Counselor within 30 days of the matter alleged to be discriminatory. 29 C.F.R. 1613.214(a)(1)(i). Once the "counseling" process finished, petitioner could file a formal, written complaint with the agency. See 29 C.F.R. 1613.214(a)(1)(ii).

contain essentially the same allegations of racial discrimination, reprisal, and sexual harassment. Petitioner's complaint in this case alleged that her July, 1998, termination was the product of racial discrimination and reprisal; that she was sexually harassed by her supervisor from 1982 to 1988; and that she was improperly removed from various bid positions within the Postal Service during her employment. Each of those allegations was contained in her complaint in *Smith II* (as amended, November 7, 1988). The two cases therefore raised the same issues of administrative exhaustion. That issue was actually litigated and decided in *Smith II*. Respondent there moved for dismissal or, in the alternative, for summary judgment, on the ground that petitioner had not exhausted her administrative remedies. The district court explicitly ruled on that issue in respondent's favor.[7]

The district court's holding in *Smith II* that petitioner failed to exhaust was also necessary to the judgment in that case. The failure to exhaust was one of two grounds on which the district court granted respondent's motion to dismiss (the other being peti-

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[7] Petitioner contends that the exhaustion issue was "hardly 'litigated' " in *Smith II* because the district court "simply concluded, in its June, 1989 dismissal of Petitioner's second complaint, that administrative remedies had not been exhausted." Pet. 15. It is unclear what petitioner is arguing here. She may be referring to the fact that, as the court noted in *Smith II*, she "failed to timely respond to the defendant's motion to dismiss" in that case. *Smith II*, Order at 1. Petitioner's failure to timely respond, however, does not mean that the issue was not litigated. Petitioner does not deny that she was provided a full and fair opportunity to litigate the exhaustion issue. See *Montana* v. *United States*, 440 U.S. 147, 153 (1979).

tioner's failure to name the proper defendant). The fact that the district court gave alternative bases for its decision does not mean that neither ground was "necessary" to its decision. A judgment based on alternative grounds generally precludes relitigation of either ground. See *Schellong* v. *INS*, 805 F.2d 655, 658 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987); *Gelb* v. *Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986), cert. denied, 480 U.S. 948 (1987); *Deweese* v. *Town of Palm Beach*, 688 F.2d 731, 733-734 (11th Cir. 1982); *In re Westgate-California Corp.*, 642 F.2d 1174, 1176-1177 (9th Cir. 1981).

Petitioner contends that the district court's resolution of the exhaustion issue in *Smith II* was incorrect. Pet. 15. She argues that the administrative claims that she filed prior to that decision—which challenged employment actions that occurred before July, 1988—should have been construed broadly to encompass all of her discrimination claims, including her claim in the instant case that she was fired in July, 1988, because of her race and gender. Pet. 16-17. Petitioner also argues that "[t]he requirement that federal employees should exhaust administrative remedies before pursuing a Title VII action in federal court is to be construed liberally." Pet. 16. Collateral estoppel bars reconsideration of those arguments.[8]

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[8] As an independent ground for granting a writ of certiorari, petitioner contends that it was error for the district court to consider the collateral estoppel argument because it was raised for the first time in respondent's motion for reconsideration in the district court. The premise of that argument is incorrect. Respondent explicitly raised the affirmative defense of collateral estoppel in his Answer to petitioner's Complaint.

Finally, the district court in this case found that petitioner did not produce any evidence that she had exhausted her administrative remedies after *Smith II* was decided on June 16, 1989. Petitioner does not contend that she initiated any new administrative proceedings after that date. Nor did any of the administrative claims that petitioner initiated prior to that date challenge her June 20, 1988, notice of termination, which is the primary focus of her complaint in the instant case.[9]

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[9] Two EEO discrimination cases that petitioner filed with the Postal Service were finally resolved by the agency after the district court decided *Smith II*. See notes 3-4, *supra*. As previously noted, those cases concerned: (1) petitioner's claim that she was not considered for an accounting clerk position in January, 1988 (Case No. 3-S-0297-88); and (2) petitioner's challenge to her April, 5, 1988, notice of termination, which was subsequently withdrawn pursuant to a settlement (Case No. 3-S-0300-88). The resolution of those administrative cases, however, did not necessarily serve to exhaust petitioner's administrative remedies for purposes of the instant case.

As a general rule, a federal employee may not seek judicial review of "new acts of discrimination" that have not been the subject of administrative claims. See *Wu* v. *Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989). Whether allegations of discrimination in a judicial complaint are "new" depends upon whether they are " 'reasonably related' to charges in the administrative filing and 'no material differences' between them exist." *Ibid.* See also *Ong* v. *Cleland*, 642 F.2d 316, 318 (9th Cir. 1981) (whether plaintiff has exhausted his or her administrative remedies depends on an analysis of the "fit" between the administrative charges brought and investigated and the allegations of the subsequent judicial complaint); *id.* at 320 (finding that administrative claim of discrimination in promotion did not encompass employee's later judicial complaint of constructive discharge). Whether the instant lawsuit is sufficiently "related," for purposes of exhaustion, to petitioner's administrative claims regarding employment actions that oc-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

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curred prior to her termination requires a fact-based inquiry that does not warrant this Court's review.